

ALERTS

Final SEC Rules Amending Schedule 13G and 13D Beneficial Ownership Reporting

October 13, 2023

On Oct. 10, 2023, the SEC adopted amendments to the rules governing beneficial ownership reporting on Schedule 13G and 13D (“Final Rules”). Since the publication of the proposed rule changes in February 2022^[1], market participants have awaited the Final Rules to see how the SEC would balance the competing interests at play.

As expected, the SEC shortened the filing deadlines applicable to activists filing on Schedule 13D as well as Schedule 13G filers, however, the deadlines adopted are longer than those originally proposed. It determined not to adopt other, more controversial, proposed amendments related to beneficial ownership of shares referenced by certain cash-settled derivatives and group formation (and related proposed exemptions), but instead offered Commission guidance in those areas. Consistent with the proposal, Item 6 of Schedule 13D has been amended to clarify that cash-settled derivatives that reference the applicable issuer’s equity securities are required to be disclosed in Item 6 of Schedule 13D. In addition, as expected, the filing deadline has been pushed to 10 p.m. Eastern Time (instead of 5:30 p.m. Eastern Time on the filing deadline) and Schedules 13D and 13G are now required to be filed using a structured, machine-readable data language.

Filing Deadlines:

Initial Filing Deadlines

- Schedule 13D.

- *As Amended. Five business days* following the acquisition of beneficial ownership of more than five percent or losing eligibility to file a Schedule 13G.
- *Prior to Adoption. 10 calendar days* following the acquisition of beneficial ownership of more than five percent or losing eligibility to file a Schedule 13G.
- Institutional and Exempt Schedule 13Gs.
 - *As Amended. 45 calendar days after the calendar quarter-end* in which beneficial ownership exceeds five percent, computed as of the last day of the calendar quarter.
 - *Prior to Adoption. 45 calendar days after the calendar year-end* in which beneficial ownership exceeds five percent, computed as of the last day of the calendar year.
- Accelerated Institutional Schedule 13G.
 - *As Amended. Five business days* after the end of the month in which beneficial ownership exceeds 10 percent, computed as of the last day of the month.
 - *Prior to Adoption. 10 calendar days* after the end of the month in which beneficial ownership exceeds 10 percent, computed as of the last day of the month.
- Passive Schedule 13G.
 - *As Amended. Five business days* after acquiring beneficial ownership of more than five percent.
 - *Prior to Adoption. 10 calendar days* after acquiring beneficial ownership of more than five percent.

Deadlines for Filing Amendments

- Schedule 13D.
 - *As Amended. Two business days* following a material change.
 - *Prior to Adoption. Promptly* following a material change.
- All Schedule 13Gs.

- *As Amended. 45 calendar days after the end of any calendar quarter* if a “material change” has occurred as of the end of the calendar quarter.
 - The “materiality” standard leaves filers with less certainty than they undoubtedly had hoped for. The SEC does not specifically define “material” and instead reiterates that under federal securities laws materiality is an established concept and is deemed to be present under Rule 12b-2 where there is “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” The SEC states that the fact that the Schedule 13D amendment rule specifies that an increase or decrease in beneficial ownership of one percent or more is deemed to be material for purposes of Schedule 13D amendment obligations is instructive to determine whether a Schedule 13G quarter-end amendment obligation has been triggered, but also notes that acquisitions or dispositions of less than one percent can also be material.
 - *Prior to Adoption. 45 calendar days after the end of any calendar year* if any change has occurred as of the end of the calendar year.
- Institutional Schedule 13G.
 - *As Amended. Five business days after the end of the month* in which beneficial ownership exceeds 10 percent or thereafter increases or decreases by more than five percent, in each case, computed as of the end of the month.
 - *Prior to Adoption. 10 calendar after the end of the month* in which beneficial ownership exceeds 10 percent or thereafter increases or decreases by more than five percent, in each case, computed as of the end of the month.
- Passive Schedule 13G.
 - *As Amended. Two business days* after beneficial ownership exceeds 10 percent or thereafter increases or decreases by more than five percent.
 - *Prior to Adoption. Promptly* after beneficial ownership exceeds 10 percent or thereafter increases or decreases by more than five

percent.

Filing Day Deadline

The Final Rules extend the deadline for submitting Schedule 13G and 13D filings from the current 5:30 p.m. Eastern Time to *10 p.m. Eastern Time*.

Reporting of Cash-Settled Derivatives

The SEC did not adopt a proposed rule which would have made all non-passive holders of cash-settled derivative securities (*other than* security-based swaps or, SBSs) the beneficial owner of the shares referenced by its cash-settled derivatives, even absent an express right to direct the voting, acquisition or disposition of such shares. Instead, the SEC provided guidance primarily tracking the existing definitions of beneficial ownership under Rule 13d-3(a), (b) and (d) and its 2011 SBS guidance[2] making clear that a holder of a cash-settled derivative security (*including* SBS) will be considered to be the beneficial owner of the shares referenced by its cash-settled derivative security if such cash-settled derivative security:

- i. Provides its holder, directly or indirectly, with voting or investment power over the underlying shares;
- ii. Is acquired for the purpose or effect of divesting its holder of beneficial ownership of the underlying shares or preventing the vesting of the beneficial ownership as part of a plan or scheme to evade the beneficial ownership reporting requirements; or
- iii. Provides its holder with the right to acquire beneficial ownership over the underlying shares within 60 days if the holder is passive, or, regardless of when the right is exercisable if the holder acquired beneficial ownership of the equity security with the purpose or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect – it is *noteworthy* that the SEC states that this prong would apply to a derivative security that is nominally “cash-settled” or that provides such right based on an “understanding” related to the derivative security.

Groups

The proposed rules on group formation and related exemptions were not adopted as part of the Final Rules. Instead, the SEC again opted to provide Commission guidance around group formation.

The proposed rules included two particularly controversial changes. The first was to remove the requirement that an “agreement” be present among group members and instead include in the definition of group “concerted actions” by two or more persons for the purpose of acquiring, holding or disposing of securities of an issuer. The second was to specify that a group would exist where, in advance of filing a Schedule 13D, a filing person discloses to any other person that such filing will be made if the other person acquires securities subject to the Schedule 13D.

The Commission guidance will prove comforting to those that feared that the SEC’s group proposal on “concerted actions” could lead to the conclusion that all like-minded investors could be deemed a group. The SEC emphasizes in its guidance that a group requires evidence of an agreement, arrangement, understanding or concerted action and in order for a group to have been formed, at a minimum, indicia, such as an informal arrangement or coordination in furtherance of a common purpose to acquire, hold or dispose of securities of an issuer, must be present.

The SEC includes specific questions and answers on group formation in the release that are helpful to shareholders looking to understand the risks they run in exchanging views with other shareholders (including activists) and issuers. The guidance is in line with historical SEC guidance, which encourages the exchange of views among shareholders and with issuers without necessarily leading to group formation or the loss of passive status.

However, the SEC did include guidance stating that a group may exist where, in advance of filing a Schedule 13D, a filer discloses to any other person that such filing will be made if the other person acquires securities as a direct result of the filer’s information. However, more promising than the proposed rules is that the final determination as to whether a group is formed between the filer and the other market participants will ultimately depend upon the facts and circumstances, including (1) whether the purpose of the filer’s communication with the other market participants was to cause them to purchase the securities and (2) whether the market participants’ purchases were made as a direct result of the information shared by the filer. It will remain to be seen whether the SEC’s guidance on

this point will have the effect of chilling discussions among activists and other shareholders who do not want to run the risk that the facts will be interpreted in an unfavorable light.

Disclosure of Derivative Securities

The SEC did adopt amendments to Item 6 of Schedule 13D to clarify that disclosure of all derivative securities that use the issuer's equity security as a reference security is required, including disclosure of cash-settled security-based swaps and other cash-settled derivatives. It also adopted amendments to Item 6 to make clear that Item 6 provides an exhaustive list of the types of instruments required to be disclosed.

Structured Data Requirement

The Final Rules require Schedules 13D and 13G to be filed using a structured, machine-readable data language.

Effectiveness and Compliance Dates

The Final Rules will go into effect 90 days after publication in the federal register. However, compliance with the revised Schedule 13G filing deadlines will not be required before Sept. 30, 2024.

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If you have any questions concerning this Alert, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] <https://www.srz.com/resources/modernization-of-beneficial-ownership-reporting.html>

[2] *Beneficial Ownership Reporting Requirements and Security-Based Swaps*, Release No. 34-64628 (June 8, 2011).

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